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In The
SUPREME COURT OF THE UNITED STATES

No. 397

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,
Appellee, Respondent,

vs.

WILSHIRE OIL COMPANY OF TEXAS,
Appellant, Petitioner.

PETITION OF WILSHIRE OIL COMPANY OF TEXAS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA,
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WILSHIRE OIL COMPANY OF TEXAS,
Appellant, Petitioner.

PETITION OF WILSHIRE OIL COMPANY OF TEXAS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Wilshire Oil Company of Texas, a Delaware corporation, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on the 24th day of March, 1970. A corrected opinion was filed April 23rd, 1970. Rehearing was denied the 16th day of June, 1970.

OPINIONS BELOW

This Petition seeks a review of the judgment of the Court of Appeals for the Tenth Circuit (Appendix page A1) which affirmed the judgment of the United States

District For the District of Kansas (Appendix page A2). The Court of Appeals decision has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was dated the 24th day of March, 1970. A corrected opinion was filed April 23rd, 1970. Rehearing was denied the 16th day of June, 1970. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Did the Appellate Court err in denying a judgment of acquittal based on the defense of double jeopardy in a Sherman Act prosecution in the United States District Court in Kansas where the defendant Wilshire entered a plea of nolo contendere in a similar case in the United States Court in Missouri?
2. Did the Appellate Court err in ruling that the indictment and the evidence were sufficient to allege or prove that defendant Wilshire knowingly joined a conspiracy, knowing of its existence and agreed to become a part of it, and with knowledge committed some act in furtherance thereof?
3. Did the Appellate Court err in ruling that the indictment and the evidence were sufficient to allege and prove a conspiracy in restraint of trade "in commerce?"
4. Did the Appellate Court err in overruling defendant's motion for a new trial based on prejudicial newspaper articles read by the jurors during the trial?

STATUTORY AND FEDERAL RULES INVOLVED

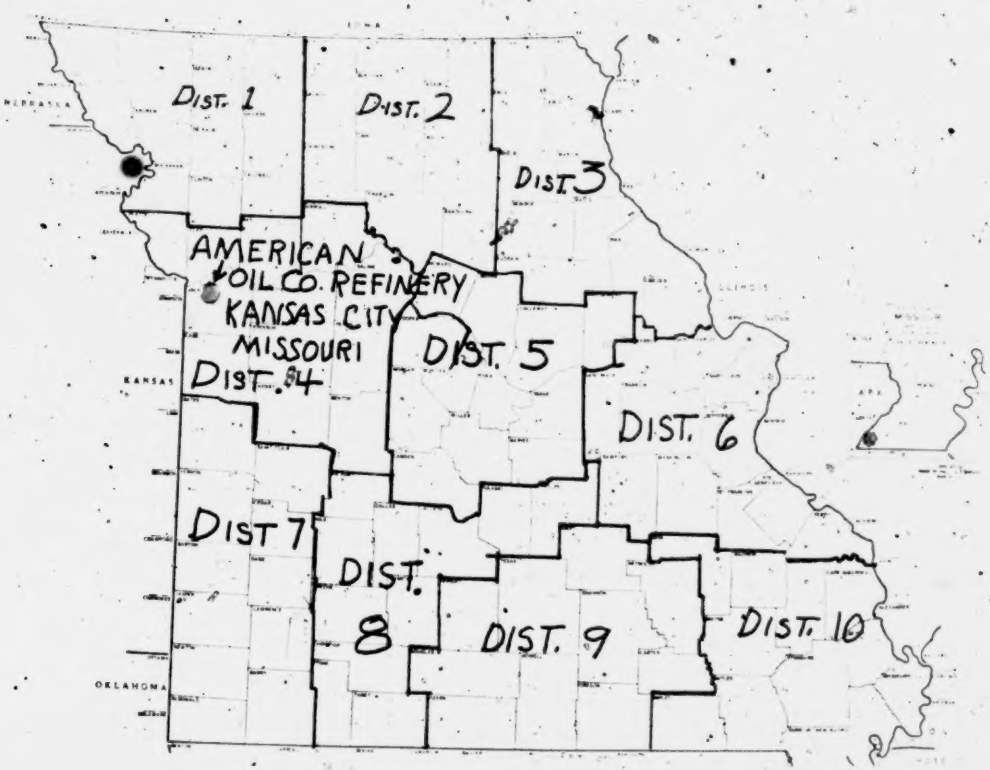
This Petition for Certiorari involves the prosecution of defendant Wilshire under Title 15, § 1 U.S.C.A., and Title 15 § 2.

STATEMENT OF FACTS

For Geographical background in the case a brief reference to maps of Kansas and Missouri will lend aid to a better understanding of the case.

Missouri is divided into ten districts for Highway Department affairs. There is only one refinery in Missouri at Kansas City, Missouri, which is owned and operated by American Oil Company (Standard).

The Missouri Map shows this:



Kansas is divided into six highway department divisions.

The oil company refineries are located as follows:

Phillips Petroleum Co., (Union Asphalt and Roadoils Inc.) Kansas City Kansas

American Petrofina Co., El Dorado, Kansas

Skelly Oil Co., El Dorado, Kansas

Socony-Mobil Oil Co., Inc., Augusta, Kansas

Apco Oil Co., Arkansas City, Kansas

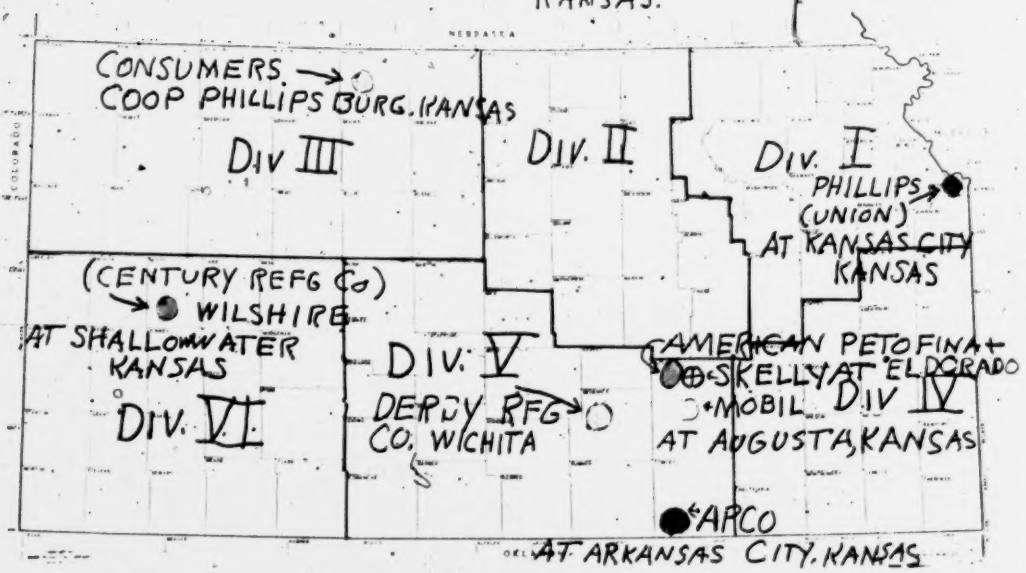
Derby Refining Co. (Colorado Oil and Gas Co.) Wichita, Kansas

Consumer's Cooperative Assn., Phillipsburg, Kansas

Wlishire Oil Co., (Century Refining Co. owned the Refinery) Shallow Water, Kansas

The Kansas map shows this division and the refinery locations:

HIGHWAY DIVISIONS AND REFINERY LOCATIONS KANSAS.



This is an action by the United States Government against Wilshire and other defendants for an anti-trust violation of the Sherman Act Title 15, § U.S.C. 1, for alleged price fixing in the sale of liquid asphalt to the State of Missouri. The action was brought in the United States District Court for the District of Kansas. The defendants besides Wilshire were:

Socony Mobil Oil Company, Inc.
Skelly Oil Company
The Consumers Cooperative Association
American Petrofina Company of Texas
Union Asphalts & Roadoils, Inc.
Colorado Oil and Gas Corporation
The American Oil Company
Apco Oil Corporation
Phillips Petroleum Company.

All of the defendants entered pleas not guilty, and later all of the defendants, except Wilshire, entered pleas of *nolo contendere* and received fines from $50,000 down to $25,000. Wilshire filed motions to dismiss the indictment based on the grounds of insufficiency of the indictment and upon the grounds of double jeopardy growing out of a previous conviction on a *nolo contendere* plea in the United States District Court for the Eastern District of Missouri, Eastern Division. These motions were overruled at a pretrial hearing without prejudice to the right of the defendant to renew same.

The Missouri prosecution was for an alleged conspiracy for fixing the price and allocating the territory and sales of roadoil or asphalt to the State of Missouri and in

United States District Court in Kansas the charge was based on fixing the price and allocating territory between companies in the sale of roadoil and asphalt to the State of Kansas.

Trial was had to the jury in September of 1967, resulting in a guilty verdict. Defendant Wilshire filed a motion for judgment notwithstanding the verdict and renewed its motion for judgment of acquittal and in the alternative for a new trial and also filed a motion to dismiss on the grounds of double jeopardy. These motions were taken under advisement and the Court finally overruled the motion for judgment of acquittal notwithstanding the verdict and motions for a new trial. On the issue of double jeopardy after a separate hearing the court overruled the motion for acquittal based on double jeopardy and fined the defendant $25,000 and costs of this action, from which decision an appeal was lodged in the United States Court of Appeals for the Tenth Circuit.

Wilshire Oil Company of Texas, a Delaware corporation, with its home office in New York and its operating office in Denver, Colorado, had never been involved in the sale of asphalt or road oils prior to 1961 and did not own or operate a refinery refining crude oil.

Riffe Petroleum Company, an Oklahoma corporation, was organized in early 1957. Its principal place of business was Tulsa, Oklahoma. L. E. Riffe was its president and managing officer. It engaged in the business of selling liquefied petroleum gas and liquid asphalt. In 1959 Riffe Petroleum Company, the Oklahoma corporation, contracted with Century Petroleum Company in Shallow Water, Kansas to be the broker of asphalt produced by Century Refining Company in its refinery in Scott County, Kan-

sas. In early 1960 Thomas W. Masterson who had previously sold asphalt for Union Asphalt and Roadoils Company out of Kansas City, Missouri and lived in Kansas City, Kansas, left Union in 1958 and became a salesman on his own, selling independently as Universal Asphalt Company. He was a broker in the State of Missouri for American Petrofina and Apco, Oil Companies producing asphalt in other Kansas refineries. L. E. Riffe hired Masterson in Kansas to be a part time salesman for Riffe Petroleum Company before its merger with Wilshire for the State of Kansas in 1960.

Riffe Petroleum Company, the Oklahoma corporation, merged with Wilshire Oil Company of Texas effective as of December 31, 1960 and Wilshire became the surviving Company. Wilshire Oil Company disposed of its Riffe Petroleum Company Division and the Riffe Petroleum Company assets effective August 9, 1963, after that time was no longer in the asphalt or road oil business in either Missouri or Kansas. Two years after it had disposed of its Riffe Division a grand jury investigation was commenced in the United States District Court in St. Louis, Missouri in 1965. A grand jury indictment was filed in the United States District Court in St. Louis, Missouri on July 22, 1965, indicting 18 oil companies engaged in selling liquid asphalt or road oil to the State of Missouri and 17 individuals. Of the companies Wilshire Oil Company of Texas was included. Also indicted was one O. Homer Riffe, Missouri salesman for Wilshire and brother of L. E. Riffe.

Pleas of *nolo contendere* were entered by all of the defendants, including Wilshire Oil Company of Texas and its representative, O. Homer Riffe. A fine of $10,000 was paid by Wilshire and $2,000 by Riffe.

In the Missouri grand jury proceeding witnesses were

subpoenaed and the duces tecum subpoena said, "The subpoena are shall mean and include the States of Missouri, Kansas and Iowa." Following the conclusion of the case is Missouri the documents subpoenaed in Missouri were by agreement submitted to a Federal Grand Jury that was later convened in the United States District Court for the District of Kansas at Kansas City, Missouri. Many of the oil company employees subpoenaed as witnesses in the Missouri Grand Jury proceedings were subpoenaed again in Kansas. It was stipulated at the post-trial double jeopardy hearing that witnesses who testified in the Missouri Federal Grand Jury testified about the situation in Kansas while before the grand jury. The indictment in Kansas named as defendants eight companies that sold liquid asphalt in both Missouri and Kansas, these companies were as follows:

American Oil Company (Standard Oil Company) Refinery located at Sugar Creek, Missouri

Union Asphalt and Roadoils, Inc. (Broker for Phillips Petroleum Company whose refinery was located in Kansas City, Kansas

Phillips Petroleum Company, Refinery located in Kansas City, Kansas

Socony-Mobil Oil Company, Refinery located in Augusta, Kansas

Skelly Oil Company, Refinery located at Augusta, Kansas

American Petrofina Company of Texas, Refinery located at El Dorado, Kansas

Apco Oil Company, Refinery located at Arkansas City, Kansas

Wilshire Oil Company of Texas (brokers for Century

Refining Company, Refinery located at Shallow Water, Kansas).

These companies also plead *nolo contendere* in Missouri and were fined.

These refineries or companies provided all of the asphalt for road maintenance sold in Kansas and almost half of such asphalt in the State of Missouri.

From the Missouri indictment at page 12 U.S.C.A., Appendix Volume I and the following pages, the Missouri system of bidding and allocation of territory in violation of the Sherman Act was for the salesmen for the various companies to meet in different places in Missouri and Kansas and Oklahoma, where in meetings they designated the low bidders for the sale of liquid asphalt to the State of Missouri for the Missouri maintenance letting. These low bidders were allocated delivery locations in each county for the sale of asphalt. A score sheet or bible was distributed containing agreed upon prices in each of the 114 Missouri counties and the salesmen agreed that the low bidder would bid below the agreed upon prices and where it was not to be the low bidder would bid above such agreed upon price.

From the Kansas indictment, page 1, U.S.C.A., Appendix Volume I, and the following pages, the Kansas system of bidding and allocation of territory was for the representatives of the defendant companies to meet in various Kansas cities and in other cities and there designate the low bidders for the sale of liquid asphalt to the State of Kansas, allocating among themselves delivery locations and agreeing upon f.o.b. prices. It was agreed that each defendant would bid below the agreed upon f.o.b. price

and freight rates for the sales on which it was to be the low bidder and each defendant would bid the agreed upon f.o.b. price and freight rate above for sales on which it had agreed not to be the low bidder. Common freight rates were distributed among the defendants to be used in bidding to each of the 400 delivery locations in the State of Kansas.

From the evidence we find that for highway maintenance purposes the State of Kansas is divided into six divisions and the State of Missouri is divided into ten districts. (See Exhibits A, J-2, and X-1) (Vol. III Exhibits—10th C.A. Appendix). Two refineries and two companies that are indicted in Kansas were not indicted in Missouri. Consumers Coop (later known as Farmland) had a refinery at Phillipsburg, Kansas, and Colorado Oil and Gas Corporation (formerly Derby) had a refinery at Wichita, Kansas. There was only one refinery located in the State of Missouri which was not an oil producing State and this was American Oil Company (Standard) located at Kansas City, Missouri.

The evidence reveals that Kansas City, Kansas and Kansas City, Missouri comprise one trade area. The United States Government through the Interstate Commerce Commission treats a portion of the Kansas City Trade area as one zone including Kansas City, Missouri and Kansas City, Kansas within the meaning of Section 203-B-8 of the Interstate Commerce Act, see 288 Motor Carrier Cases ICC Commission Case No. MCC258. (Exhibits X-2 and X-3, Vol. 3, Exhibits, 10th C.A. Appendix.)

The Kansas City refinery price as agreed upon in this heart of America area for MC asphalt was 8¼ cents a gallon, principally for the years 1962 established prin-

cipally by American Oil Company (Standard) on the Missouri side and Phillips Petroleum Company (Union Asphalt) on the Kansas City, Kansas side.

How the bidding operated in the State of Kansas is illustrated by two years about which there was testimony, 1961 and 1963.

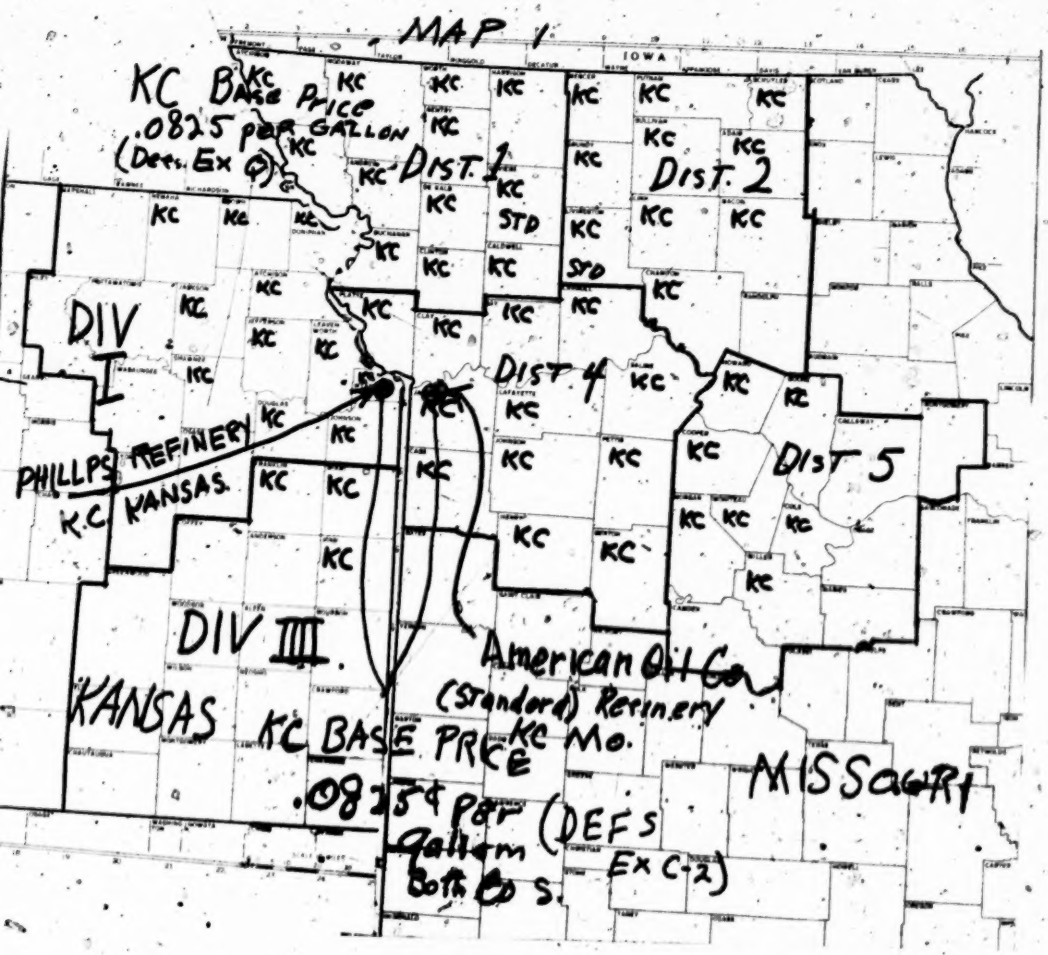
From the testimony of Warren Smith, 10th C.A. Appendix, Voume II, page 305, we find that in January of 1961 he met Mr. Patch of Union at the Muehlbach Hotel in Kansas City, Missouri, at a convention, and went to the Phillips Hotel to a room where Mr. Dave Wasser of Derby (Colorado Oil & Gas Company) discussed the Kansas maintenance letting. Freight rate changes for the freight in Kansas City were discussed by Mr. Wasser, and they obtained the freight rates from the base point of El Dorado, Kansas. Then later Mance of Standard and Patch of Union and Warren Smith of Union met in Union's office in Kansas City. They then divided up over .30 delivery points in Divisions 1 and 4 in the Kansas maintenance letting and agreed to use a base price of 8¼ cents f.o.b. refinery and Kansas City freight to the delivery point in determining their bids agreeing who was to be the low bidder. These delivery points were only in Divisions 1 and 4 in Eastern Kansas, as neither of these refineries bid anywhere else in the State of Kansas. Later at a meeting in the Broadview Hotel at Wichita, Kansas, later in January of 1961, the various representatives of the oil companies met and allocated delivery points in the State of Kansas. Standard and Union did not bid in the other four divisions in Kansas and Consumers Co-op and Wilshire only bid in Divisions 3 and 6 in the extreme western part of Kansas.

James Adamson of Phillips Petroleum Company tes-

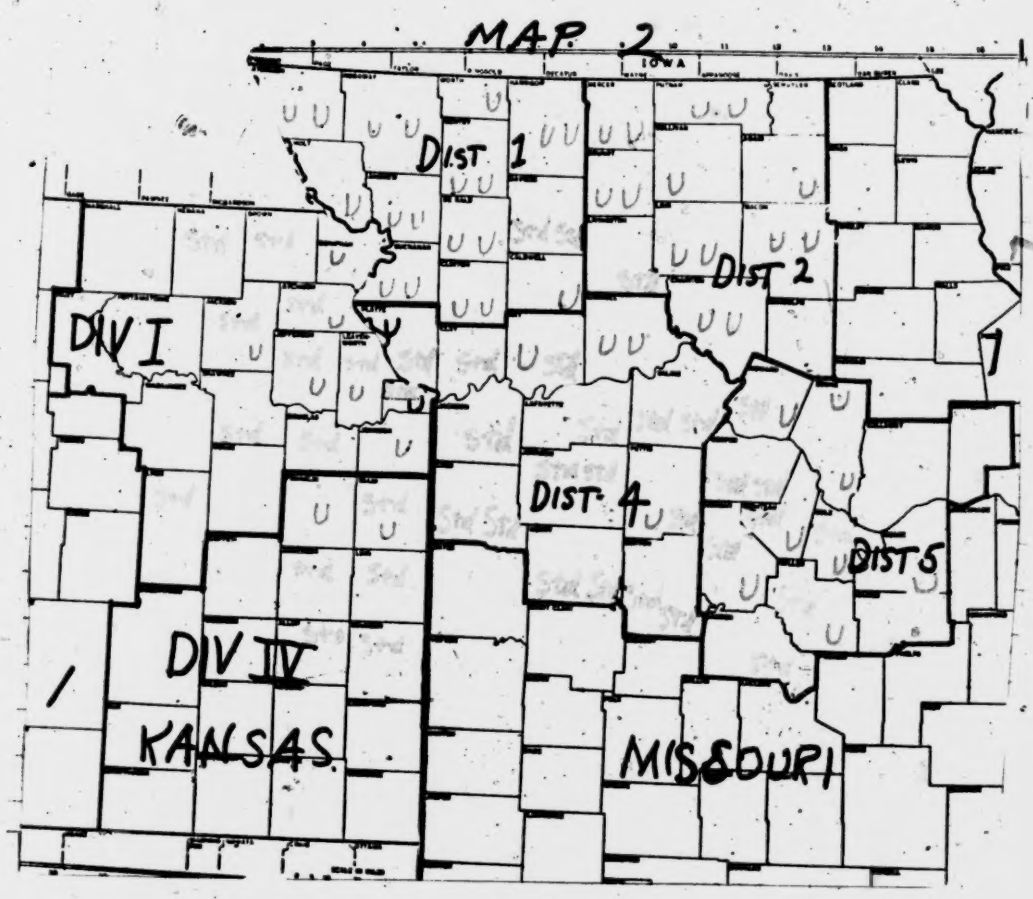
tified that in 1963 (see U.S.C.A. Record Volume II, page 204 *et seq.*) that Adamson and Mance of Standard agreed to use the base price of Kansas City posting of both refineries, Standard and Phillips, and the interstate tariff as a yardstick from the Sugar Creek refinery of American Oil Co. in Missouri to points in Division 1 and 4 in Kansas, coming up with a common set of prices in their division and allocation of territory in Kansas. Adamson, later in the Broadview Hotel, Wichita, Kansas meeting states he took the information to the meeting as to the division of points between Adamson and Mance, and told the Kansas suppliers that Phillips and Standard were going to use the base price at Kansas City and spelled it out what that price was. The base price was the Kansas City base price of 8¼ cents and the Interstate Commerce Commission freight in determining their bids.

Further to show the evidence of a common price and a common trade area and one conspiracy in Kansas and Missouri, we refer to Defendant's Exhibit D-2, (Vol. II Exhibits) which was the Missouri "Bible" for 1962 and compare it with Defendant's Exhibit C-2 (Vol. II of Exhibits) which was the 1962 Kansas maintenance bid sheet. The points in this territory are awarded principally to either Union, Phillips or Standard and both the Missouri and Kansas side carry an almost uniform price of 8¼ cents per gallon plus freight. From the exhibits we have compiled the following analysis:

The relation between the two states can readily be observed by reference to the two following combination maps of Missouri and Kansas.



Map 2 shows low bidders in Kansas and Missouri as between Union (Phillips) and Standard (American Oil Co.—bids are both shown) in Missouri.



These show a division of points principally between Standard and Union (Phillips) in the Kansas City trade area. The facts and the testimony point to the following:

1. The price in the Missouri-Kansas area of asphalt was the same, namely, 8¼ cents a gallon.

2. The delivered price was approximately the same, as a study of the Kansas and Missouri successful bids will reveal.

3. The price range in the unsuccessful bids was the same in both states.

4. The source of supply was the same in both states in the area surrounding the Eastern third of Kansas and the Western half of Missouri.

5. The two so-called conspiracies in Kansas and Missouri were tied together and there was a substantial interrelationship between the two conspiracies. The two refineries that straddle the Missouri boundary line at Kansas City control the prices in areas stretching over 100 miles in all directions around Kansas City. The facts show that there was a common price and a common freight rate for the companies bidding in the Kansas City area using the Kansas City refinery price of American (Standard) and Union (Phillips) and an interstate tariff insofar as the division of points between Union and Standard was concerned. Divisions 1 and 4 in Kansas and the adjacent districts to Kansas City in the State of Missouri being Districts 1, 4 and 7 had a common price of MC asphalt of 8¼ cents per gallon in 1961, 1962 and 1963. The prices were established by the two companies, Standard on the Missouri side and Phillips or Union on the Kansas side and the surrounding territory was carved up by agreement and this agreement was both to fix the prices and

to allocate the territories. In addition, Adamson, on cross-examination (10th C.A. App. Vol. II p. 264) testified telling counsel for Wilshire in an interview the following:

> "Nothing specific except that in general it was understood that the suppliers in Kansas were possibly restricting their bids in Missouri in consideration of the fact that they would be permitted a greater share of the Kansas volume available by so doing."

The conspiracy apparently was loose in both states because there is evidence (App. Vol. II, p. 292) where the Standard representative took points assigned to Skelly at the Kansas agreement and did it in retaliation of Skelly taking points in Montgomery County, Missouri, assigned to Standard in the Missouri conspiracy and later there was testimony that there was an exchange agreement whereby Skelly supplied Standard's points in Kansas and Standard supplied Skelly's points in Missouri.

1. DID THE APPELLATE COURT ERR IN DENYING A JUDGMENT OF ACQUITTAL BASED ON THE DEFENSE OF DOUBLE JEOPARDY IN A SHERMAN ACT PROSECUTION IN THE UNITED STATES DISTRICT COURT IN KANSAS WHERE THE DEFENDANT WILSHIRE ENTERED A PLEA OF NOLO CONTENDERE IN A SIMILAR CASE IN THE UNITED STATES COURT IN MISSOURI?

The plea and proof of double jeopardy is a good defense as it appears by an analysis of the Complaints that there are common factual issues to both cases which are admitted by the Motion to Dismiss.

1. *The Defendants*

(a) Eight of the ten defendants named in the Kansas

indictment had been named as defendants in the Missouri indictment. They are:

The American Oil Company

Socony Mobil Oil Company

Skelly Oil Company

American Petrofina Company of Texas

Union Asphalts & Roadoils, Inc.

Phillips Petroleum Company

Apco Oil Company

Wilshire Oil Company of Texas.

All of the companies named as defendants in the Kansas indictment are named as defendants in the Missouri indictment except two, The Consumers Co-Operative Association and The Colorado Oil & Gas Corporation.

2. *The Product*

The product which is the subject matter — "Liquid Asphalt" is defined in each indictment in identical language and then states that it is used in the maintenance and repair of highways.

We find the nature of trade and commerce set out in both indictments.

MISSOURI INDICTMENT

IV. *Nature of Trade and Commerce*

"8. Many states, including the state of Missouri, buy and use substantial quantities of liquid asphalt for the maintenance of certain types of roads and highways which commonly are referred to as 'black top

roads.' For this purpose the state of Missouri annually uses substantial quantities of liquid asphalt."

Inasmuch as the words "other states" appear throughout the indictment, we must argue that other states includes Kansas.

KANSAS INDICTMENT

IV. *Nature of Trade and Commerce*

"6. Many states, including the State of Kansas, buy and use substantial quantities of liquid asphalt for the maintenance of certain types of roads and highways which commonly are referred to as 'blacktop roads.' For this purpose the State of Kansas annually uses substantial quantities of liquid asphalt."

The use of the language "many states" in the Kansas indictment would, of course, include Missouri.

The nature of the trade and commerce are set out in both indictments is that "many states" buy and use asphalt for the maintenance of roadways.

We find paragraph V in the Kansas Indictment reads as follows:

OFFENSE CHARGED

"12. Beginning sometime prior to 1959 and continuing thereafter through at least 1965 the exact dates being to the grand jurors unknown, the defendants and co-conspirators entered into and engaged in a combination and conspiracy and unreasonable restraint of the hereinbefore described interstate trade (*many states buying and using substantial quantities of liquid asphalt which would include both Missouri and Kansas*) and commerce in liquid asphalt in violation of Section 1 of the Act of Congress of July 2,

1890, 15 U.S.C. 1, commonly known as the Sherman Act."

We assert that the Kansas indictment includes in its Nature of Trade and Commerce paragraph and Offense charged paragraph the State of Missouri, particularly where it says "hereinbefore described interstate trade" which includes the trading and buying by many states.

The offense charged in the Kansas indictment does not limit the hereinbefore described interstate trade to the State of Kansas.

The time period of the conspiracy alleged overlaps. In the Kansas indictment — beginning sometime prior to 1959 and continuing thereafter through at least 1965— and in the Misscuri indictment it is verbatim except that it reads * * * prior to 1960 and continuing thereafter through at least 1963. Each indictment states that the defendants met at the places named and had conversations at hotels, motels, restaurants, clubs, offices, and other places where they did the things alleged. The Missouri designation of places was at St. Louis, Clayton, Jefferson City, Kansas City in Missouri, Tulsa, Oklahoma, and other cities. The Kansas designation of places was Kansas City, Topeka, Salina, and Wichita, Kansas, and in other cities.

Both of the indictments conclude in paragraph XVIII with "The combination and conspiracy alleged in this indictment was entered into in part and has been carried out in part within the Eastern District of Missouri," and

Paragraph XVII of the Kansas Indictment reads:

"The combination and conspiracy alleged in this Indictment has been carried out in part within the District of Kansas."

In addition we wish to point out two more items attached in the certiorari Appendix, being certified copies of the Complaint in the United States District Kansas in Civil Action KC 2487, United States of America, plaintiff v. Socony Mobil, *et al.*, not including Wilshire, it having ceased doing business in Kansas in 1963. The suit seeks an injunction to restrain the defendants from fixing the price of asphalt and it was a companion case to the antitrust prosecution of all of the companies. We have appended the complaint and the stipulation of the counsel and also the consent decree. (Appendix IV and V) We point out that the government in the injunction case in its prayer for relief treated the arrangement as a multi-state conspiracy for the reason in the prayer for relief it said:

> "Wherefore plaintiff prays: * * * That each defendant etc. * * * be perpetually enjoined and restrained from continuing, maintaining or renewing directly or indirectly any combination or conspiracy hereinbefore alleged or from engaging in other combination or conspiracy having a similar purpose or affect or from adopting or following any practice, plan, program or device having a similar purpose or effect IN THE SALE OF LIQUID ASPHALT TO ANY CUSTOMER IN THE UNITED STATES."

In the consent decree in the definitions in paragraph 2 (c) it is said:

> "The mid-continent area shall mean the states of Montana, North Dakota, South Dakota, Wisconsin, Minnesota, Iowa, Nebraska, *Kansas, Missouri*, Arkansas and Oklahoma."

The enjoining part paragraph 6 says:

> "For a period of five years following the date of entry of this final judgment each defendant is ordered and directed to furnish simultaneously with each

sealed bid and each sealed quotation for the sale of liquid asphalt submitted by it to *any federal, state or local agencies* or any other government awarding authorities in the mid-continent area of the United States an affidavit."

The decree of the Court apparently restrained a multi-state conspiracy.

As background for our argument that the plea of double jeopardy is a good defense, we refer to several preliminary cases. It is fundamental that the Government cannot fragment a single conspiracy. There are a number of cases where fragmentation of a single conspiracy was unsuccessfully attempted.

One of the leading cases is *United States v. Cohen*, 197 F.2d 26 (3 Cir., 1952). In this case one of the defendants, Wright, was tried twice for violation of the conspiracy laws pertaining to narcotics. He was tried in New York and convicted for participation in the New York area. In a second case in the United States Courts in New Jersey he was charged with the same type of offense. The Court of Appeals held his plea of double jeopardy was good, stating that a single conspiracy cannot be split up for the purpose of prosecution. Other cases where fragmentation of a single conspiracy was unsuccessfully attempted are the following: *Manning v. United States*, 275 F. 29 (8th Cir. 1921); *Powe v. United States*, 11 F. 2d 598 (5 Cir., 1926); *United States v. National Cheese Institute*, Criminal No. 33197, N. D. Ill., 1950; *United States v. United States Gypsum Co.*, 51 F. Supp. 613.

Wilshire relies principally upon three very recent cases known as the "Honda cases." These are *United States of America v. American Honda Motor Co.*, (U.S.D.C. N.D.

September 1, 1967) 271 F. Supp. 979; *United States of America v. American Honda Motor Co.*, (U.S.D.C. N.D. Ill. E.D.) 273 F. Supp. 810; and *United States of America v. American Honda Motor Co.*, (U.S.D.C. S.D. E.D.) 289 F. Supp. 277 (October 3, 1968).

An analysis of the three Honda cases, two in California and one in Illinois, follows:

U. S. v. American Honda Co., Inc., et al., No. 35909, U. S. D. C. So. Dist. California, filed March 15, 1966	U. S. v. American Honda Co., Inc., et al., No. 40956, U. S. D. C. No. Dist. California So. Div., filed August 3, 1966, 271 F Supp 779	U. S. v. American Honda Inc., et al. No. Dist. Illinois Eastern Div., filed September 21, 1966, 275 F Supp 810
DEFENDANTS		
AMERICAN HONDA MOTOR CO., INC.	AMERICAN HONDA MOTOR CO., INC.	AMERICAN HONDA MOTOR CO., INC.
Honda Dealers Association of Southern California	Bay Area Honda Dealers Assn.	Chicago Area Honda Dealers Assn.
John C. McCormack AH	Joseph A. Quaid AH	Tom Cates AH
Kiyohiko Okumoto AH	T. C. Browne AH	Robert R. Shaw A
Paul J. Collins A	Clifford G. Schmillen AH	James Leo A
Stephen A. Fordvee A	Gary Jones AH	Gale T. Johnson A
William A. Krause A	Charles N. Miller A	Basil Proskia A
Charles E. Scott A	Gayse L. Nelson A	
	Edward Correa A	
AH—Sales Managers or District Managers of Honda		
A—Officers of Local Area Association		
OFFENSE CHARGED		
Restraint of trade or commerce in Honda Motorcycles, etc., in the GREATER LOS ANGELES AREA	Restraint of trade or commerce in Honda Motorcycles, etc., in the SAN FRANCISCO BAY AREA	Restraint of trade or commerce in Honda Motorcycles in the CHICAGO area
Price fixing of Hondas in the Los Angeles area	Price fixing of Hondas in the San Francisco area	Price fixing of Hondas in the Chicago area
TIME PERIOD		
January 1963 to sometime in 1965	August 1961 until sometime in 1965	About March 1963 until sometime in 1965
PLACE		
GREATER LOS ANGELES AREA	SAN FRANCISCO BAY AREA	CHICAGO AREA
PRODUCTS		
Honda Motorcycles Parts and accessories	Honda Motorcycles, parts and accessories	Honda Motorcycles parts and accessories
STATUTE		
Section 1, Sherman Act	Section 1, Sherman Act	Section 1, Sherman Act
TRADE AND COMMERCE		
Flow of Hondas to destinations in the United States, including the GREATER LOS ANGELES AREA	Flow of Hondas to destinations in the United States, INCLUDING THE SAN FRANCISCO BAY AREA	Flow of Hondas to destinations in the United States, INCLUDING THE CHICAGO AREA
EFFECTS		
Prices fixed in the GREATER LOS ANGELES AREA	Same in SAN FRANCISCO BAY AREA	Same in CHICAGO AREA
Competition suppressed in the GREATER LOS ANGELES AREA	Same in SAN FRANCISCO BAY AREA	Same in CHICAGO AREA
Customer deprived of competitive prices in the GREATER LOS ANGELES AREA	Same in SAN FRANCISCO BAY AREA	Same in CHICAGO AREA

The Ohio case was determined and decided October 3, 1968, and appears at 289 F. Supp. 277 and is similar to three cases set forth above with the exception that the offense charged is restraint of trade and price fixing of Hondas in the Ohio area. The place is the Ohio area. The effects were that prices were fixed in the Ohio area, competition suppressed in the Ohio area, and customers deprived of competitive prices in the Ohio area.

In the case of *Los Angeles* Honda plead *nolo contendere* and was fined $10,000. In the *San Francisco* case it filed a motion to dismiss on the question of double jeopardy, and the trial judge, Judge Swigart, in his opinion finds that the defense of double jeopardy was good and also there was a lack of due process and continued harassment in the proceedings.

From the record in the *San Francisco* Honda case we find from an affidavit of one of the counsel a history of how the cases arose, that subpoenaes were issued by a Grand Jury in Los Angeles and documents were subpoenaed from all over the United States from dealers' associations and dealers in New Jersey, Illinois, Florida, Georgia, Michigan, Ohio, Washington, Montana, Oregon, Idaho and New England. This was similar to the government's actions as in our instant case where in the Missouri Grand Jury proceeding documents are subpoenaed covering both Kansas and Missouri and witnesses were interrogated in the Missouri Grand Jury regarding affairs in Kansas.

The Government contended that in each area, as in the instant case, the defendants and co-conspirators were concerned only with the retail prices in the Chicago area or the Los Angeles area or in the San Francisco area or in

the Ohio area and not anywhere else. In other words, Honda dealers in these separate and different market areas did not compete with each other.

The Government contended that a cursory examination of the four indictments shows that each alleges a conspiracy limited to the fixing of retail prices in a particular geographical area and these geographical areas are widely separate from each other and all the defendants except American Honda are different in each case. The Government, as in our instant case, claims there were four separate price fixing conspiracies and the only common ground was that American Honda was involved. All three Federal judges in each of the three cases felt there was one conspiracy and that the Government could not fragment and uphold the defense of double jeopardy.

Each of the Honda cases was appealed, except the Ohio case, to the Supreme Court of the United States and either on stipulation or motion of the defendant the appeals were dismissed. In Honda the Government contended and it is a fact, that the market areas were separate. In our case the areas are much closer together. The Kansas refineries by and large supplied most of Missouri, as well as Kansas. The price range was the same, around ten cents a gallon delivered in both states. Companies doing business both in Kansas and Missouri according to the complaints and the proof were conspiring to fix the prices in the Kansas City area, regardless of whether it was in Kansas or Missouri, and, as was pointed out in the Honda cases, Honda was interested in maintaining a price throughout the United States. We find the refiners in the Kansas City area on both sides of the Missouri Kansas boundary, as well as the refineries throughout Kansas, were inter-

ested in a common price in the Heart-of-America area, particularly, and also throughout the State of Missouri and worked together in both states to fix the price of MC asphalt at a uniform delivered price, as we have pointed out, of around ten cents per gallon.

KOONTZ CASE

One of the cases cited in the Honda cases is the case of *United States v. H. E. Koontz Creamery, Inc.*, (U.S.D.C. D. of Maryand, 1966) 257 F. Supp. 295. In this case the United States District Judge, Watkins, sustained a plea of double jeopardy.

In the two *Koontz* cases there were common defendants with one exception. The area was practically the same, although there was an overlap in area. The product in the first case was milk sold to schools. The product in the second case was milk sold to the general public. The prices were not the same. The defendants were previously fined on a plea of *nolo contendere* for conspiracy to allocate school milk contracts. Thereafter, the defendants were again indicted for conspiracy to fix prices at which milk products could be sold to regular retail and wholesale trade. In the opinion the Court says:

> "The court however, upon the entire record, finds with our hesitation that during all the times in question there existed an *arrangement and agreement with respect to the maintenance of non-competitive milk prices in the Baltimore Metropolitan area. The type of milk distribution—street, school, jugs—were all parts or aspects, or factors of, and inextricably parts of, this overall design.* It may be true that the course of a conspiracy, like that of true love, may not always run smoothly, and may be marked by 'family squab-

bles.' Here, although the individual participants were not serfs, the overall purpose under aegis of MDA (association) was continuous. * * * *The single purpose—non-competitive milk prices in the Baltimore Metropolitan area*—was continuous and pervasive; and the various agreements as to street, school and jug prices were merely devices or means to effect the overall end." (Emphasis partially added)

Investigation reveals that this case was not appealed by the Government. Pointing out the rule of this case to our case at bar, the single purpose of the present Missouri and Kansas cases was to establish non-competitive prices in the Kansas City area and spread them in both directions in Kansas and Missouri.

CORN PRODUCTS CASE

Another important case upon which we rely is the case of *United States v. Corn Products.* This case was decided by the Southern District of California and is Case No. Criminal 30937. It was decided in 1962. It has not been published in the Federal Reporter System but this does not detract from its value.

There were two indictments—one in the *Armour* case and the other in the *Corn Products* case—both returned by the same Grand Jury on the same day. Both indictments resulted from a single Grand Jury investigation of industrial facts and oil industry in the western states.

In the *Corn Products* case the charge was for monopoly and price fixing in the sale of shortening which was made from crude vegetable oil obtained primarily from cottonseed and soy beans. In the *Armour* indictment the charge was conspiracy and price fixing in the sale of salad

oil produced by refining crude vegetable oil obtained primarily from cottonseed and soy beans. There were different products but the same customers.

The *Armour* case was tried first and the defendants won a trial to a jury and then plead double jeopardy in the second case, the *Corn Products* case. The Court in his opinion in a special finding of fact says:

> "The records in the two cases demonstrate a product over-lap which impairs the validity of the product differentiation by which the government seeks to distinguish the two cases. Considerable evidence in the Armour case related to salad oil. The price lists on which the government relies is proof of conspiracy in this Corn Products case to establish prices for liquid shortening as well as salad oil. The pricing of liquid shortening was within the scope of and was liquidated in the Armour trial."

The Court further said in one of its conclusions, after finding that the combination and continuing agreement was the same combination in each case:

> "The central core and the basic facts of the offenses charged in the two cases were and are the some. The two cases were and are so related, and the issues and facts were and are so intermingled and intertwined that the Judgment of Acquittal in the Armour case was a determination adverse to the government on the issue of conspiracy essential to the proof of the offense charged in this case."

A fact at this point which we cannot overlook is that in the case at bar the evidence reveals that a portion of the overt acts of the conspiracy were carried out in the Kansas conspiracy in part in Missouri. This can be found in the allegations in the Complaint in the last paragraph, as well as the various meetings of Mance and Adamson and

others in Missouri in discussing the Kansas conspiracy.

It is well settled that where an overt act is committed in one jurisdiction, all of the alleged conspirators, which would include all of the Kansas people, could have been tried in the State of Missouri in the Missouri case.

Going back to the *Corn Products* case and applying the reasoning of the Court on the overlapping of the products and price list, we find by analogy an overlapping agreement in the Kansas City Heart-of-America area between the Phillips and Standard refinery on the same price structure and this pricing was within the scope of the litigation in the Missouri case, because it took place in Missouri and it was a fact situation mutual to both cases, as well as permeated the whole price structure in the two states. We find Mance and Adamson sitting in Kansas City, Missouri, using .0825¢ per gallon base point refinery price and using the interstate commerce freight for Kansas City to the point in Kansas as a measuring yard for price fixing and division of territory between the two refineries. By reference to defendant's Exhibit D-2 (10th C.A. Appendix Vol. III, Exhibits) on the double jeopardy hearing, which is the Missouri bidding sheet and the Missouri tabulation of bids, and that allegation in the indictment that the refineries adopted the over-under bidding system, we have the same thing happening in Missouri which creates a measuring stick for price fixing and division of territory between the two refineries in both states, which spreads to the other Kansas refineries selling into Missouri.

Adamson then took this agreement to Wichita where the other companies were told of the arrangement. There was an overlap in the pricing arrangement, as in the

Corn Products case, much closer together than the geographical area sought to be established by the Government in the Honda cases heretofore referred to. We submit that this Kansas City trade area pricing and territorial division in this area permeates the entire Kansas-Missouri area making it a situation where a pricing overlap involves both sides of the Missouri-Kansas boundary, making it a common course of action and one conspiracy. In this connection, the Government relied on the price fixing and territorial arrangement and agreement between Phillips (Union) and American Oil Company (Standard) in the Kansas City area and the subsequent shipments from the Sugar Creek (Missouri) refinery of Standard of the asphalt produced in Missouri into Kansas to established the interstate commerce proof necessary to establish its "in commerce" interstate commerce theory and such an operation was "in commerce" and a jury found the facts that the shipments were "in commerce" from the Standard refinery in Missouri to Kansas, although Wilshire never agreed to give "over and under" bids in Division 1 and 4 in Eastern Kansas or in 2 and 5 in Central Kansas and was quite insulated from the Phillips-Standard agreement as to price and territory and argued against it being "in commerce."

The Government now executes an about face and contends there is an insulating wall down the Missouri-Kansas boundary. It is Wilshire's contention that the pricing and territorial arrangement in the Kansas City area spreads in both directions and creates and builds one conspiracy. The Government cannot cross the bridge between Kansas City, Kansas, and Kansas City, Missouri, to establish an interstate commerce conspiracy and deny

Wilshire's right to cross the bridge to establish a defense of double jeopardy.

The fact that the areas are different is unimportant, see *Powe v. United States*, 11 F. 2d 598, Fifth Circuit, 1926. An analysis of the first charge and the later charge which was held to be double jeopardy herewith follows. The pertinent syllabus is as follows:

> "4. Criminal law—Defendant held to have been put in jeopardy under former indictment, though it referred to liquor sales in certain city, while present indictment referred to sales anywhere in district in which such city was located (National Prohibition Act, tit. 2 [Comp. St. Ann. Supp. 1923, § 10138½ et seq.])"

In the Opinion the Court says:

> "The government cannot split up one conspiracy and make several conspiracies out of it."

The *Powe* opinion cites *In re Snow*, 7 S. Ct. 556, 120 U. S. 274, 30 L. ed. 658. In this case the defendant cohabitated with seven women as his wives. He was charged for cohabiting through different time periods. The Supreme Court of the United States held one offense.

> "A grand jury cannot divide a continuous offense, arising under said Act of 1882, into arbitrary parts, call each part a separate offense, and find separate indictments therefor."

We cited previously *United States v. Cohen*, 197 F. 2d 26, (C.C.A. 3rd).

The principle against double jeopardy is set forth in *U. S. v. Mazzochi*, 75 F. 2d 497, (2nd Cir. 1935).

The difference between the two cases was in one case there was an attempted sale under a conspiracy statute of heroin and in the other case there was an attempted sale

of opium. In this case as in our case at bar there were two different customers. In the heroin case there was an attempted sale to one customer and in the opium case there was an attempted sale to two other persons. We fail to see the difference between a conspiracy to sell from the Kansas City area at fixed base price of 8¼ cents a gallon to Missouri and sale at the same price to a different customer, towit: the State of Kansas.

In *Braverman v. United States*, 317 U. S. 49, 63 S. Ct. 99 and 87 L. Ed. 23, the court in its opinion says:

> "for when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.
>
> * * *
>
> "The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation only the single penalty prescribed by the statute can be imposed."

2. DID THE APPELLATE COURT ERR IN RULING THAT THE INDICTMENT AND THE EVIDENCE WERE SUFFICIENT TO ALLEGE OR PROVE THAT DEFENDANT WILSHIRE KNOWINGLY JOINED A CONSPIRACY, KNOWING OF ITS EXISTENCE AND

AGREED TO BECOME A PART OF IT, AND WITH KNOWLEDGE COMMITTED SOME ACT IN FURTHERANCE THEREOF?

The law is clear that "a person does not become liable as a conspirator unless he knows of the existence of a conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance of it." *Jones v. United States*, Tenth Circuit, 1958, 251 F. 2d 28, certiorari denied, 78 S. Ct. 703. In addition to *Jones v. U. S.* the following cases support our position.

United States of America v. Salvatore Falcone, 311 U. S. 205, 85 L. Ed. 128. The second syllabus is applicable:

> "The gist of the offense of criminal conspiracy as defined by § 37 of the Criminal Code (18 U.S.C. § 88), is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy, and *persons having no knowledge of the conspiracy are not conspirators.*"

Knowledge of a conspiracy was held vital in the case *Ingram v. United States*, 360 U. S. 672, 3 L. ed. 2d 1503, 79 S. Ct. 1314, 1959, where the Court in the 12th syllabus says:

> "To establish the intent requisite to a conviction of conspiracy, the evidence of knowledge of the unlawfulness of the purpose of the conspiracy must be clear, not equivocal."

Ingram has been cited and quoted by the Tenth Circuit, see *Dennis v. United States*, C.A. 10, 1962, 302 F. 2d 5.

> "Without knowledge, intent to participate in an established conspiracy cannot exist.
>
> "To establish intent, in conspiracy prosecution, evidence of knowledge must be clear and not equivocal."

See also:

Maracante v. United States, C.C.A. 10, 1944, 49 F. 2d 156;

VanHuss v. United States, C.C.A. 10, 1952, 197 F. 2d 120;

Duke v. United States of America, C.C.A. 5, 1956, 233 F. 2d 897;

Call v. United States of America, C.C.A. 5, 1959, 265 F. 2d 167;

Miller v. United States, C.A. 9, 1967, 382 F. 2d 583:

"In order to establish person as a participant in a conspiracy, the evidence must show that accused intended to join and cooperate in the illegal venture. "Knowledge that conspiracy exists is minimum requirement for establishing requisite intent to conspire, and to establish intent, evidence of knowledge must be clear and not equivocal."

United States v. Rappaport, C.A. 3, 1961, 292 F. 2d 261.

In applying the law to the facts, we find that the Court in its opinion in the case at bar is in error as the Court makes an erroneous assertion that is not based on any facts and is directly contrary to the facts.

At page 8 the court says in its Opinion in referring to Masterson, that "The agent attended the 1960 meeting of asphalt salesmen when the 'points' were divided up and was successful in getting only nine of them in a single western Kansas division." This is incorrect. The 1960 asphalt maintenance bids were due by December 2, 1959, see Government Exhibit 7, in the file of Exhibits in the Office of the Court Clerk of the Tenth Circuit, this exhibit was not reproduced. The bid notice was sent out by the State of Kansas and says:

> "Notice is given that sealed proposals for the furnishing of bituminous materials, etc., will be received by the Director of Purchasers, State of Kansas—until 2:00 P. M. December 29, 1959."

An examination of this exhibit, Riffe Petroleum Company's bid, shows that it was signed on November 30, 1959. Obviously any meeting between the asphalt salesmen to allocate territories and fix prices would have to have been had prior to November 30, 1959. Masterson was not employed by Riffe Petroleum Company until after January of 1960 and so it would have been impossible for him to have attended any meeting where the 1960 delivery points were divided up and there is no evidence that he did so. There were no more meetings to allocate territory and fix prices for Kansas maintenance asphalt until early January 1961 when prior to January 10, 1961 Masterson attended the Wichita meetings.

At page 10 the Court says:

> "And we believe the ticklish problem of pre-merger knowledge must be decided against Wilshire on the facts. Although appellant claims to have unwittingly bought into an on-going conspiracy and for that reason it ought to be excused, the totality of the evidence supports the conclusion that Wilshire had ample opportunity to detect and reject the illegal practices."

The Court has said that Wilshire could have investigated. Wilshire had no personnel in Oklahoma except those in the Riffe Division. It had operating personnel for its oil and gas operations in Denver, Colorado and its management office was in the office of Reed and Crane, attorneys in New York City. Its efforts to begin an audit met with frustration shortly after the merger.

Testimony of a Wilshire Vice President reveals that after the merger Wilshire auditors were refused access to the books of Riffe division until Riffe was made executive Vice President of Wilshire on the 27th of January, 1961. (C.A. App. Vol. II, p. 393).

It was not until after the 27th of January, 1961, after Masterson had met the Kansas asphalt salesmen at Wichita that Wilshire's auditors could even get in the door to audit the Riffe books and by that time the Riffe Division was already in the alleged conspiracy.

It is also our position that an investigation would have availed Wilshire nothing in view of the wars between Wilshire and its Riffe Division resulting in the two *Wilshire v. Riffe*, 381 F. 2d 646, and *Wilshire v. Riffe*, 406 F. 2d 1061. A reference to the transcripts and records in those two cases will reveal that it required extensive discovery depositions and it was not until 1965 that Wilshire discovered that its Kansas salesman had his own company and was representing competing companies selling asphalt in the State of Missouri.

Masterson, if he gained any knowledge of conspiracy before January 1, 1961 was not acting in the scope of Wilshire's employment prior to the merger. The Court's Opinion seems to suggest that Masterson gained his knowledge while acting in the scope of his employment with Wilshire.

Judge Hill states in his Opinion that Wilshire had ample opportunity to detect and reject the illegal practices. This taxes our credulity—what opportunity? There were no conspiratorial activities until after the merger. January 1, 1961, was a Sunday, January 2nd was a New Year's Holiday Monday. The bid of Riffe Division of Wil-

shire was signed in Tulsa on January 10, 1961, Government Exhibit 8.

In the interim of 7 days from the 3rd of January, which was the first day Masterson would have been on duty, until possibly the 8th of January when he had to send the bid to Tulsa, Wilshire Oil Company of Texas with its home office in New York and its operating office in Denver and its Riffe Division in Tulsa, had no opportunity to make any investigation into Masterson's activities. The Riffe Division doors were closed to Wilshire's auditors until January 27, 1961.

It is a harsh rule indeed to hold that a corporation acquiring another through merger must quickly act as a policeman immediately checking all the salesmen of the company it is acquiring to discover whether or not any are in antitrust activities. Wilshire did not have ample opportunity to detect and reject the illegal practices. According to the Complaint, C.A. App. Volume I, page 12, the alleged conspiracy had been going on since 1959 in Kansas and since 1960 in Missouri, C.A. App. Volume I, Transcript, page 16. The other defendants apparently had not discovered it through their own legal departments and the government did not discover it until after a detailed, under oath, Grand Jury investigation beginning sometime in 1965.

Thus the evidence is conclusive that when Wilshire acquired its Riffe Division it could not have knowingly joined the conspiracy.

Neither the Indictment nor the proof are sufficient to charge the defendant knew of the existence of the conspiracy, agreed to became a part of it and with that knowledge committed some act in furtherance thereof as

required by law. The law is clear that in cases of joining an alleged conspiracy that is already in existence, the Indictment must allege that the conspiracy was formed; that the defendant knew of its existence; and with knowledge agreed to join it and committed some act in furtherance of it. The Indictment does not state that the defendant knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. In the absence of such allegation and in the absence of such proof the Indictment and the proof in support thereto both are fatally defective.

The Tenth Circuit, has so held in the case of *Jay Jones v. United States*, (10 Cir., 1958) 251 F. 2d 288, certiorari denied 78 S. Ct. 703. This case was the prosecution of police officials and liquor dealers and others for conspiring to violate the laws of the United States by importing intoxicating liquor into the dry states of Oklahoma. The Tenth Circuit held that the evidence was insufficient to show that a defendant who was a Missouri liquor dealer who sold large quantities of liquors to the other defendants who were found guilty was a conspirator. The pertinent syllabus is as follows: syllabus 7:

> "A peron does not become liable as a conspirator unless he knows of the existence of a conspiracy, agrees to become a party, and with that knowledge, commits some act in furtherance thereof."

Also see syllabus 8:

> "In prosecution of city police officials, liquor dealers and others for conspiring to violate the laws of the United States by importing intoxicating liquors into dry state of Oklahoma evidence was insufficient to establish that operato of liquor stores in Missouri from whom quan ties of liquor were purchased

knew of conspiracy and consented to be party or knowingly did any act to accomplish its purpose."

The government's theory was that Wilshire knowingly joined a conspiracy.

The evidence is clear that the only knowledge of any of Wilshire's officials could have reached was through L. E. Riffe and Thomas Masterson, both of whom were knowledgeable as to affairs in Kansas. Masterson started working for Union Asphalts & Roadoils Co., in 1953 and left in 1957, and forming his own company, Universal Asphalt, he sold in Misouri. There is testimony that he knew the ropes in Kansas.

The evidence reveals that L. E. Riffe had worked for Allied Materials Corporation and Kerr-McGee, both of whom were indicted in Missouri and plead *nolo contendere.* Masterson had worked for Union Asphalt & Roadoils and sold for American Petrofina and Apco, all three of which were indicted in Missouri and Kansas and plead *nolo contendere.*

The fact that Wilshire acquired Riffe and that Riffe Petroleum Company had been guilty of any crimes through activities of one of its minor part-time salesmen would not be chargeable to Wilshire. See *United States v. Carter,* 311 F. 2d 934 (6 Cir., 1963).

"Prosecution for violation of statute making it unlawful for any employer to pay money to a union representative. The United States District Court for the Northern District of Ohio, Kalbfleisch, J., entered judgments of conviction and defendants appealed. *The Court of Appeals, O'Sullivan, Circuit Judge, held, inter alia, that a corporation's acquisition of assets of a subsiditary did not make acquiring corporation chargeable, as a principal, for crime previously com-*

mitted by subsidiary or an officer thereof in making an unlawful payment of money to a union representative, nor did conduct of acquiring corporation in failing to press for repayment of the spurious loan made to the union official or its act in charging off the note render it guilty of crime charged against it of paying money to a union representative of its employees." (Emphasis Added)

The Court in its opinion says:

"A corporation's acquisition of a subsidiary did not make acquiring corporation chargeable as a principal for crime previously committed by a subsidiary or an officer thereof in making a unlawful payment of money to a union representative."

The only knowledge Wilshire could have acquired would have been knowledge acquired prior to the merger by either Masterson or Riffe. Knowledge of an agent is not notice to a company where the agent acquires his knowledge prior to his becoming an agent and acquires his knowledge illegally.

The Court was careful to instruct on this score, so in the face of this instruction, it is hard for us to conceive how the knowledge of Masterson and Riffe was carried over into Wilshire. The Court at page 470 (C.A. App. Vol. III) says to the jury:

"In this connection I instruct you that any knowledge that Thomas Masterson or any officer or employee of Wilshire may have had of any conspiracy or any participating by him or them in any acts in furtherance of the conspiracy prior to December 31, 1960, or after August 9, 1963, are not chargeable to Wilshire."

Guilty knowledge of the conspiracy was not existent but for the knowledge of Masterson and Riffe which they

had acquired prior to the merger, and we feel the Court was inconsistent in his rulings, particularly when you take into consideration his remarks on the sentencing which took place on the 25th of October.

Counsel (C.A. App. Vol. IV p. 663) made remarks in mitigation and said:

> "I think Your Honor should ask yourself what chance did Wilshire have to avoid this situation. The merger was in early December. The effective date of the merger is January (December) 31, 1960, at which time three days later Masterson was in a meeting and he had already been in these meetings as Your Honor recalls from the evidence. Wilshire had no knowledge that is other than Riffe with whom it feuded violently as your Honor is aware of the two cases involving Wilshire's fight with Riffe."

The Court agreed with counsel (App. Vol. IV p. 663) where it said:

> "Well, I certainly take into consideration what you have had to say, Mr. Woolsey, about the situation. *The circumstances under which Wilshire acquired the Riffe Petroleum Company and in effect bought an on going conspiracy along with the assets of Riffe Petroleum Company* and I think the Court should consider that in mitigation." (Emphasis Added)

THE EVIDENCE AND INDICTMENT WERE INSUFFICIENT TO PROVE A CONSPIRACY IN RESTRAINT OF TRADE IN COMMERCE.

(FACTS REGARDING INTERSTATE COMMERCE)

The facts, as to the interstate aspect of the commerce in asphalt, presents an interesting situation which ties in

with our argument on double jeopardy. The facts as to interstate commerce are these:

A study of the map of the State of Kansas (Government Exhibit 227, Defendant's Exhibit A, Vol. III, 10th C.A. Appendix III Exhibits Document 231) shows that Kansas is divided into six highway divisions. In Division I at Kansas City, Kansas, was located Phillips Refinery at Kansas City, Kansas, in the Fairfax District. Derby, or Colorado, had a refinery at Wichita in Division 5. Mobil had a refinery at Augusta, Kansas, in Division 5. Skelly and American Petrofina each had a refinery at El Dorado in Division 5. Apco had a refinery at Arkansas City, Kansas, in Division 5. Riffe Division of Wilshire sold as a broker for Century Refining Company with a refinery located in Division 6 at Shallow Water, Kansas, and Consumers Co-op (Farmland) had a refinery at Phillipsburg located in Division 3. The only refinery that shipped asphalt into the State of Kansas was Standard's refinery located at Sugar Creek in Missouri at Kansas City, Missouri, and an examination of various exhibits (Government Exhibits 3 through 6, consisting of a tabulation of the bids by the State of Kansas, 10th C.A. Appendix, Vol. I Exhibits) and Government Exhibit 224, (Vol. I Exhibits) the delivery tickets covering deliveries of asphalt from American Oil Company's Sugar Creek refinery reveal that Standard shipped asphalt into Kansas into Division I the upper part of Division IV and a point in Clay County and Gary County in Division III in 1963.

A study of the bid tabulations reveals that Standard made no bids in Division III and VI where Consumers Co-op or Wilshire bid, and neither did it make any bids in Division V.

The Government relied only on the shipments of asphalt from Standard's refinery at Sugar Creek into Divisions I, II and IV in Kansas to establish its "in commerce" theory. The Court (10th C.A. App. Vol. III p. 418) advised counsel as to his instructions:

> "I will tell the jury as a matter of law on the question of interstate commerce aspect of the case that the crude, the fact that crude oil came into various refineries part of which later became liquid asphalt which was sold to the State would not be sufficient to establish the interstate commerce aspect of the case and further that the interstate shipment from the Sugar Creek refinery by American Oil Company, if the jury finds that these shipments were made pursuant to and as a part of the conspiracy, if the jury finds there was a conspiracy would constitute interstate commerce."

The Court instructed the jury (10th C.A. App. Vol. III p. 472) that the fact crude oil may have moved across the state line to one or more of the refineries should not be considered in determining whether or not interstate commerce was restrained and further that there was a cessation of movement in interstate commerce and a change in the form of the imported crude oil, so, therefore, a sale from a refinery in Kansas to the State of Kansas would be intrastate and not subject to the provisions of the Federal Antitrust Act.

The Court further instructed the jury (10th C.A. App. Vol. III p. 472) that if American Oil shipped liquid asphalt into Kansas in the furtherance of a conspiracy and that Wilshire was a co-conspirator, then, as a matter of law, the Government has proven the interstate commerce aspect. In this case the Government relied on solely the "in commerce" theory. Mr. Burke in arguing the case

(10th C.A. App. Vol. III p. 547) on the afternoon session of Monday, the 25th of September, 1968, on Motion to Dismiss stated:

> "Your Honor, the Government can proceed on one of the two theories. It can show it can proceed under the in commerce theory or affecting commerce theory. Under the in commerce theory it needs to show shipment across the state lines. Under the affecting commerce theory, it need *show no shipment across state line*, but that the price affected interstate commerce." (Emphasis added)
>
> "In this case, Your Honor, we are relying solely on the inflow or in commerce theory. They are both the same."

Under the in-flow or in-commerce theory it is not necessary for the Government to show any effect on commerce. All that is necessary to prove is that the product shipped in interstate commerce was restrained and the restraint in the Sherman Act price fixing and allocation of territories indictment is the price fixed and the allocation attached to the asphalt that was shipped from Sugar Creek, Missouri, to destinations in the State of Kansas.

The facts as to the interstate commerce aspect show the only "in commerce" business was the shipment of Standard's asphalt into Divisions I and IV in the Eastern part of Kansas with shipments to two Eastern-most counties in Division II. The proof was that Riffe Division of Wilshire only bid in Divisions III and VI and that Co-op with a refinery in Division III at Phillipsburg bid in Division III and VI and sold asphalt in those two and made a few bids in Division II and V. (Government Exhibits 3, IV, V and VI (10th C.A. App. Vol. I Exhibits).

The Government's counsel in his opening statement,

says its theory was each refinery agreed state-wide where it would bid and where it would bid low and where it would give phoney bids and Standard and Phillips agreed to bid, as far as the Eastern territorial situation was concerned, and carried the bid to the meeting at Wichita where the state was carved up like a piece of pie. The proof was that Masterson and Jackson, as to Divisions 1 and 4, insofar as Riffe Division of Wilshire and Consumers was concerned, no agreement between them would have any effect on interstate commerce.

The proof in this case shows that only one company imported asphalt into the State of Kansas—American Oil at Sugar Creek, just outside Kansas City, Missouri. This refinery sold asphalt in liquid form in northeastern Kansas in Division 1 and did bid and sell one year in Clay County in Division 2 but sold no further west and made no sales or bids any further west than Clay County. It sold some asphalt and made some bids in Division 4 but none in 5, 3, or 6. Wilshire through its Riffe Division made no sales or bids other than in Divisions 3 and 6 in the western-most third of Kansas. Co-op made no sales in Divisions 1, 3, 4 and 5 although it did make a bid in one county in Division 2. Since Wilshire made no bids and had no contact with Standard or Phillips there was no conspiratorial agreement shown between Wilshire and American upon whom reliance is sought to make an interstate commerce situation.

Paragraph 14 (e) of the indictment says: "Discussed and agreed that each defendant and co-conspirator would bid below the agreed-on f.o.b. price and freight rate for sales on which it was to be the low bidder and that each defendant and co-conspirator would bid the agreed-upon f.o.b. price and freight rate or above for sales on which

it had agreed not to be the low bidder. This is the method by which the so-called conspiracy was consummated in the State of Kansas. The indictment is silent as to whether or not there was an agreement on the part of Wilshire and Consumers not to bid in Divisions 1 and 4 and the Government is held therefore to paragraph 14 (e) as to the facts and there is no proof of facts to support this paragraph of the indictment insofar in Division 1 and 4. This fact situation brings us as far as Wilshire is concerned squarely within the case of *Addyston Pipe and Steel Company v. United States*, 175 U. S. 211, 44 L. Ed. 136. This case is the granddaddy of all anti-trust cases and has been followed all the way down to date. A check of Shepherd's Citator reveals that it has never been reversed or modified and has been commented upon on numerous occasions. The rule or law that concerns us is set forth in the fifth syllabus, the basic part of which is that inasmuch as Riffe Division of Wilshire made no agreement whatsoever with Standard, the out of state company, the principles set forth in the fifth syllabus of *Addyston* apply in this particular situation.

The action in the *Addyston* case was brought by the United States under the Sherman Act to obtain an injunction restraining six defendants engaged in the manufacture and transportation and sale of iron pipe from acting in a combination which was illegal and unlawful and in restraint of trade and commerce among the states. One defendant was located in the State of Ohio, one in Kentucky, two in Alabama and two in Tennessee. The line-up of the defendants was as follows:

Addyston Pipe and Steel Company, Cincinnati, Ohio

Dennis Long & Company, Louisville, Kentucky

Howard Harrison Iron Company, Bessemer, Alabama

Anniston Pipe and Foundry Company, Anniston, Alabama

South Pittsburg Pipe Works of South Pittsburg, Tennessee

Chattanooga Foundry & Pipe Works of Chattanooga, Tennessee.

The Petition charged the defendants with conspiring to allocate territories and fix prices in some 36 states and territories. The trial court dismissed the Petition 78 F. 712. The United States Court of Appeals reversed 85 F. 271. The U. S. Supreme Court affirmed but modified the restraining order insofar as it applied to sales in commerce and agreement between companies located in the same state. The fifth syllabus is as follows:

> "A combination to restrain competition proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of Congress, through the contract may be awarded to some party outside the state as to the lowest bidder."

The Court in its Opinion at page 149 of 44 L. E. says:

> "In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international only. This was probably in inadvertence merely. Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and

therefore none over combinations or agreements, so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. The combination herein described covers both commerce which is wholly within a state and also that which is interstate.

"*In regard to such of these defendants as might reside and carry on business in the same state* where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, *although it should happen that some nonresident of the state eventually obtained it.*

"The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to someone outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the Federal power derived from the commerce clause in the Constitution.

"To the extent that the present decree includes in its scope the enjoining of defendants thus situated from

combining in regard to contracts for selling pipe in their own state, it is modified and limited to that portion of the combination or agreement which is interstate in its character. *As thus modified the decree is affirmed.*" (Emphasis Partially Added)

DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON PREJUDICIAL HEADLINES READ BY THE JURY WAS WELL TAKEN

When the Jury read headlines which in essence told the world that oil companies were offering a settlement to the State of Kansas there was a prejudice to the rights of the defendant Wilshire which could not be erased. The facts regarding this situation are as follows:

At page 422 of the Transcript (10th C.A. App. Vol. III) the situation was that closing arguments had been made to the jury after almost three weeks of trial. Mr. Burke for the Government had made an opening argument. Counsel for Wilshire had completed a portion of his argument. There was a noon recess for luncheon. During the recess Wilshire's counsel got news of the publication of a story in the Topeka Daily Capital on September 28, 1967, the headline of which is "Legislators Seek Suit Settlement for 12 Oil Firms, Court's Exhibit 1 (10th C.A. App. Vol. II Exhibits). Counsel for Wilshire related, beginning on page 422 (10th C.A. App. Col. III) the facts and circumstances as to the background.

This story in the paper told of a meeting on Wednesday, the day preceding the oral arguments, where members of the Kansas Highway Commission met with State Representative, Van Cleave, attorney for Phillips' Petroleum Company, and with attorneys for some of the other oil companies and had settlement negotiations of a $12,500,000 anti-trust suit brought by the State of Kansas

against all the oil companies, including Wilshire. Wilshire's attorneys were not present at the meeting and were not even invited. Wilshire's attorneys were not egagged in any settlement negotiations with the representatives of the State Highway Commission or the State of Kansas.

After the Court was apprised of the situation, the Court, beginning on Page 425 (10th C.A. App. Vol. III) in the presence of newspaper reporters castigated the press, calling it irresponsible journalism and then discussed with counsel the case of *Mares v. United States*, a Tenth Circuit Court of Appeals case, where a prejudicial newspaper article appeared in a Denver newspaper. Following the suggestions in that case, 383 F. 2d 805 (C.A. 10th Cir., 1967), the Court called and interrogated all of the jurors, beginning at page 433 (10th C.A. App. Vol. III), whether they had read any newspaper articles or heard any mention on television or radio, including the Topeka Daily Capitol. One of the jurors did state that the previous day's newspaper had been left in the jury room during the lunch hour. The Court admonished the jury again not to read any newspaper articles and again rebuked the press for prematurely breaking such story. Some of the jurors admitted that they had been reading headlines in the papers.

After the interrogation of the jury (10th C.A. App. Vol. III p. 433 *et seq.*) arguments resumed, instructions were given, and the jury retired to deliberate. That Thursday night, September 28, 1967, Kansas City Star published a story (Court's Exhibit 3, Vol. II Exhibits). This story elaborated on the story of settlement negotiations and named Wilshire as one of the defendants. The headlines were "Attempt Made at Oil Accord—Kansas Highway Board Meets with Counsel for Firms—No Commitments Yet—

Talks Explore Possibility of Antitrust Settlement." The article went on to tell of the meeting by a group of lawyers representing some of the companies. It mentioned that similar anti-trust suits were settled out of court in Oklahoma and Missouri, named the defendants in the anti-trust case, which included Wilshire Oil Company of Texas, and then stated the Petition alleged violation of state anti-trust laws in the sale of road asphalt to the highway Commission.

At the same time the Kansas City Kansan published a similar settlement story on Thursday, September 28 (Court's Exhibit 2, Vol. II Exhibits) with the headline: "On Asphalt Case Settlement Hint." Friday morning, September 29, 1967, the Kansas City Times published a story before the jury resumed its deliberations: "Asphalt Suit goes to Jury. Deliberations will be Resumed at 9:30 o'clock Today." This story told of the settlement negotiations and the interrogation of the jury by the Judge on the subject of whether or not they had read the Topeka Capitol story. Underneath this story was an article saying "Talk of Settlement."

The contents of all the articles show that settlement was being considered with the State of Kansas by defendants including Wilshire, with respect to the State's claim in the case of the State of Kansas v. the oil companies arising out of the liquid asphalt sold to the State of Kansas, and that the Federal Criminal anti-trust case being considered by the jury involved a conspiracy with respect to the sale of liquid asphalt to the State of Kansas. The Court admonished the jury (10th C.A. App. Vol. III, P. 481):

"You are not to read any newspaper articles or watch

or listen to any television or radio programs."

and further:

> "Any violation by you of the admonition could result personal embarrassment, *possible punishment* and certainly something that all of us would like to avoid." (Emphasis Added)

The record reveals that following the Court's admonition of Thursday night, September 28, the jury was excused for the night and reconvened on the morning of Friday, September 29 and retired, following which the record reveals counsel for Wilshire (10th C.A. App. Vol. III p. 482) called the attention of the Court to the news paper articles published in the Kansas City Star Thursday, September 28, in the evening; one in the Kansas City Times on Friday, September 29; and one in the Kansas City Kansan of Thursday, September 28, which were marked as Court's Exhibits 2, 3 and 4. (Appendix Vol. II Exhibits) The jury was then excused at noon after deliberations and having the exhibits sent in and a reading of Mance's testimony and returned to deliberate at 1:00 P.M. when the rest of Mance's testimony was read to the jury.

After deliberations of over an hour the jury returned a verdict of guilty (10th C.A. App. Vol. III p. 494). At the request of counsel for the defendant, the jury was then interrogated by the Court about the three Kansas City papers, as to whether or not they saw the headlines and at the suggestion of counsel the Court interrogated the members of the jury as to the headlines. The jurors were interrogated one at a time in such fashion the jurors remained in the box and did not go back to the jury room to discuss the subject of the interrogation. Juror Kidd admitted seeing the headlines in Court's Exhibit 3 (10th

C.A. App. Vol. III p. 502), the Kansas City Star of September 29, as follows: "Attempt Made at Oil Accord—Kansas Highway Board Meets With Counsel for Firms—No Commitments Yet—Talks Explore Possibility of Antitrust Settlement." He says: "Juror Kidd: I believe that was in last night's Kansas City Star and I did see the headlines. I did not read any further." "The Court: Did you see how much of the headlines did you read?" "Juror Kidd: I saw the word Highway Department and the word *Asphalt* and I did not read any further."

We point out at this point that the word *Asphalt* appears at the bottom of the article, and we can assume that Juror Kidd must have read everything in between, including the fact the State of Kansas had sued the oil companies, including Wilshire, and that similar anti-trust suits were settled out of court in Oklahoma and Missouri. Kidd told the Court he assumed there was a connection between the headlines and the case he tried. Juror Burt (10th C.A. App. Vol. II p. 506) admitted seeing the headlines in Courts Exhibit 3, the Kansas City Star of Thursday, September 28. Juror Burt says: "I saw 'An Attempt Made at Oil' and I read right there. As soon as I saw what it was, I read no more because it was something evidently that had to do with this (case)."

Juror Choplin (10th C.A. App. Vol. III p. 515) admitted seeing the Kansas City Star issue of September 28, 1967, and said as follows:

> "The Court: Did you see or read last night's issue of the Kansas City Star, the issue of September 28, 1967?
>
> "Juror Choplin: I read part of it.
>
> "The Court: Did you happen to see in that issue a

headline reading 'Attempt Made at Oil Accord—Kansas Highway Board Meets With Counsel For Firms—No Commitments Yet—Talks Explore Possibility of Anti-trust Settlement?

"Juror Choplin: I saw the first big headline and I think I probably would have read more but since yesterday afternoon I thought it might pertain to that so I didn't read it.

"The Court: Well, I'll hand you that issue which has been marked Court's Exhibit 3 and ask you to read into the record that part of the headline which you did read.

"Juror Choplin: Just the large thing. It says 'Attempt Made at Oil Accord' and that is all I read because when it said oil I quit."

Several other jurors admitted seeing the papers in question but none admitted having seen the articles with the headlines.

At the conclusion of the interrogation the Court again castigated the press about irresponsible journalism. Counsel for defense then stated the facts, as a member of the bar, as to his knowledge of the meeting, telling the Court the first intimation he had of any meeting of settlement was (10th C.A. App. Vol. III p. 526) when a lady newspaper reporter asked him if he had been at the meeting in Topeka and counsel stated to the Court that he had no knowledge of any meeting and had not authorized anybody to attend any meeting and settlement negotiations. The issue on the reading of the headlines by the jurors was set forth in Defendant's Motion for Judgment of Acquittal or in the alternative for a New Trial. These motions were presented, argued and overruled after extensive briefing.

We point out the Court's admonition and suggestion of possible punishment to show how difficult it would be to an inquisitive juror who is an average citizen to admit having seen what happened in the papers Thursday night in the Kansas City Star and the Kansas City, Kansas paper and Friday morning in the Kansas City Times. It taxes one's credulity to believe the jury after a punishment threat by a Federal Judge would admit having read any of the three articles.

Mr. Burkhead of the Kansas Attorney General's office was a visitor during the trial and present in the courtroom. It had been mentioned in the trial that he was the Kansas Attorney General present in the courtroom.

There are many cases in support of our position that the Court would grant a new trial by reason of the fact several jurors admitted reading one or more of the headlines advising them of the settlement negotiations.

The most recent is the case of *Arthur Mares v. United States of America*, (C.A., 10th Cir.) 383 F. 2d 805, #9346, decided August 15, 1967. In this case Arthur Mares was convicted of robbery of a federal insured savings and loan association. A news article reported a confession which the trial court excluded.

The jury was given a strong comprehensive admonition against reading, listening to, or watching reports about the trial.

The Rocky Mountain News under bold headlines "Robbery Confession Admission Denied," told of guilty pleas, confessions, and the excluded evidence.

Defense counsel twice moved for a mistrial requesting the jury be polled as to whether they read it.

Judge Breitenstein in his opinion says:

> "If any juror *even saw the headline* and connected it with the trial in progress, the possibility that it would not prejudice that juror is so slight that it merits no consideration."

The *Mares* case cites *Howard R. Marshall v. United States*, 360 U.S. 310, 3 L. ed. 1250, 79 S. Ct. 1117, decided June 15, 1959. In this case the defendant was convicted in the United States District Court of Colorado on a charge of unlawfully dispensing drugs. The Court of Appeals affirmed his conviction. See 258 F. 2d 94.

The Supreme Court reversed in 360 U. S. 310, mainly because jurors read certain newspaper articles regarding the defendant's previous record in Oklahoma, which had been offered by the Government and excluded by the trial judge. A mistrial sought by the defendant; the trial judge denied the mistrial; and the Court of Appeals affirmed. Two damaging articles were published, and the trial judge learned of the articles and summoned the jurors into his chamber one by one and inquired if they had seen the articles. Three had read one of the articles, another had read two of the articles, three others had scanned the articles, and each of the jurors told the trial judge he would not be influenced by the news articles, as in the case at bar. The court in its opinion said in the second syllabus

> "In the exercise of its supervisory power to formulate and apply proper standards for enforcement of criminal law in the federal courts, the Supreme Court will reverse a judgment convicting a defendant of unlawfully dispensing a certain drug and will order a new trial, where newspaper accounts as to the illegal practice of medicine by the defendant had reached the

jurors and the information contained in the newspapers was of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence."

There is an excellent annotation in 3 L. ed. 2d. beginning at page 2004.

We have but to refer to the case of *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. ed. 2d. 600, 86 S. Ct. 1507, where Dr. Sheppard's rights were prejudiced by unfavorable news publications during the trial, and a reference to this case shows how zealously the Court should guard against such matters and grant mistrials or new trials where episodes have occurred.

An excellent annotation on the subject of "jurors reading of newspaper account of trial in criminal case during its progress as grounds for mistrial, new trial, or reversal" is found in 31 A.L.R. 2d beginning at page 417. At page 421 the text writer in A.L.R. says:

"Ultimate decision rests in discretion of court.

"In the following cases the courts have held that the juror's reading a newspaper account of the trial in a criminal action during its progress is grounds for a new trial or mistrial rests in the sound judicial discretion of the court."

citing a number of United States cases, among which the following are of interest to us:

Van Riper v. United States, (C.A., 2nd Cir.) 13 F. 2d 961, syllabus 5:

"If newspapers seen by jury affected verdict, matter held one of discretion for trial judge."

A very excellently considered opinion, although it is

a District Court opinion in the United States District Court at New York in 1930, is the case of *United States v. Montgomery,* 42 F. 2d 254. The opinion by Judge Woolsey is as follows:

> "Publication of articles concerning defendant in public press in afternoon and morning papers held such as necessarily to prevent a fair trial, to warrant a mistial."

In this case Judge Woolsey called the jurors in after some of the unfavorable publication during the course of the trial, interrogated the jurors, and asked them as to their impression. They all stated they could deal with the case on the evidence except one who seemed, according to the Court, to answer the questions rather inconclusively.

An earlier case is one from the Circuit Court of Appeals for the Third Circuit, *Griffin v. United States* (1924), 295 Fed. 437, syllabus 3:

> *Criminal law Key 855(5)—Court erred in not withdrawing jurors and granting new trial, where they read newspapers containing prejudicial statements.*
>
> "In prosecution for conspiracy to default the United States, the court erred in not withdrawing a juror and granting a new trial, where there fell into the hands of the jury newspapers stating that the prosecuting attorney said that five of the defendants had offered to make a clean breast of their part in the conspiracy and turn state's evidence, and that he held a written confession of three of the defendants, in addition to two who had pleaded guilty."

A fairly recent case is that of *Coppedge v. United States,* (C.A., District of Columbia, 1959) 272 F. 2d 504 (certiorari denied; 82 S. Ct. 92, 368 U. S. 855, 7 L. Ed. 2d 52) Syllabus 2:

"Criminal Law Key 855(5)

"In view of nature of newspaper articles, which disclosed that witness, who had been observed by jurors refusing to take stand despite repeated and peremptory direction of court, was in mortal terror of defendant, that defendant was serving a term in penitentiary for violent assault upon such witness' brother, that prosecutor was of opinion that defendant was a vicious criminal, and that judge was of opinion that witness could not be protected from defendant, either in or out of jail, court should have made, out of presence of remaining jurors, careful, individual examination of each of jurors involved as to possible effect of articles which such jurors admitted having read; but, in any event, it would have been impossible to have cured in mind of any reasonable juror damage done to cause defendant by statements in newspaper articles, and, accordingly, it was error to deny mistrial."

In conclusion on this phase of the case permit us to say that there are a large number of state court decisions along the same line; however, it would unduly lengthen this petition to make reference thereto.

CONCLUSION

In summary this case must be reversed on one or all of the four principal grounds—

Double Jeopardy

Failure to allege and prove Wilshire knowingly joined a conspiracy

Lack of Sufficient Showing of Interstate Commerce

Unfavorable Publicity Read by the Jurors

Respectfully submitted,

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